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No. 94-1453

In The Supreme Court of the United States

October Term, 1995

D. Grant Peacock,
Petitioner,
v.
Jack L. Thomas,
Respondent.

On Writ of Certiorari to the
United States Court of Appeals
for the Fourth Circuit

BRIEF OF THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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The American Federation of Labor and Congress of Industrial Organizations ("AFL-CIO"), a federation of 79 national and international unions with a total membership of approximately 13,000,000 working men and women, files this brief *amicus curiae* with the consent of the parties, as provided for in the Rules of this Court.

SUMMARY OF ARGUMENT

A. The threshold issue for decision is whether the district court had jurisdiction to determine whether the judgment against Tru-Tech, Inc. was enforceable against a person not named in that judgment but alleged to be the alter ego of the judgment debtor. The generic question of jurisdiction to enforce a federal judgment against

a closely-related third party may arise in any of the following contexts: Where a judgment debtor secrets its assets in the possession of such a third party; where a judgment debtor fraudulently conveys ownership of its assets to the third party in order to defeat a federal judgment; and where, as here, following the entry of a federal judgment, a third-party owner disregards the corporate form of the judgment debtor and depletes the debtor's assets to frustrate satisfaction of the federal judgment. In each of these situations, we submit, a federal court that enters a judgment and that has jurisdiction over the person of the third party also has ancillary jurisdiction to enforce the federal judgment.

The governing principle is that "[t]he jurisdiction of a court is not exhausted by the rendition of its judgment but continues until that judgment shall be satisfied." *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 23 (1825). This principle has given rise to the doctrine of "ancillary jurisdiction" which enables a federal court to "vindicate its authority, and effectuate its decrees." *Kokkonen v. Guardian Life Ins. Co. of America*, —— U.S. ——, 114 S. Ct. 1673, 1676 (1994). And, this Court has established that, "in aid of a jurisdiction previously acquired," a federal court has ancillary jurisdiction "over persons not parties to the judgment sought to be enforced." *Labette County Commissioners v. United States ex rel. Moulton*, 112 U.S. 217, 219 (1884). Moreover, where as here, a federal judgment debtor conspires with a third party to frustrate the judgment, a federal court must have the power to act in order to "vindicate its authority and effectuate its decrees." *Kokkonen*, 114 S. Ct. at 1676.

This Court's decision in *H.C. Cook v. Beecher*, 217 U.S. 497 (1910), is not to the contrary. That case involved allegations that, prior to the entry of judgment, corporate directors had managed the corporation in a way that failed to take into account the pendency of the lawsuit; it most emphatically did not involve conduct that took place after the federal judgment was entered and that was intended to avoid that judgment.

B. The only additional question is whether the courts below correctly held that the judgment against Tru-Tech could be enforced against Peacock. The court of appeals held that "ERISA preempts any state law of veil piercing" and provides the rule of decision in proceedings to enforce an ERISA judgment against corporate officers or directors based on post-judgment conduct. But the appellate court immediately acknowledged that "the federal common law veil-piercing rule accords with our understanding of the South Carolina rule," Pet. App. 22a-23a n.16. This being so, there is no reason for this Court to resolve the choice of law question that petitioner raises.

ARGUMENT

A. The decisions below—and the briefs of petitioner and his *amici* in this Court—address a range of issues under the Employee Retirement Income Security Act (ERISA), 29 U.S.C. § 1001 et seq., including issues critical to deciding this case, others not necessary to the decision of the case and still others not even raised by the case. We therefore begin by defining what this case is—and, equally important, is not—about.

At the threshold, this case does *not* raise any question of substance as to the scope of the ERISA liability of "fiduciaries," as defined by the Act. Where an ERISA fiduciary takes the corporate form (and especially the form of a closely held corporation), questions can arise as to the liability of an individual who controls the fiduciary corporation for the corporation's actions. But the district court, in the original proceeding here, ruled that only Tru-Tech, Inc., and not petitioner Grant Peacock, was liable for violating ERISA. That judgment was affirmed on the first appeal, and that ruling forms the law of this case.

The instant proceeding thus has a single cause and a single focus: Grant Peacock's conduct *after* Tru-Tech had violated ERISA and *after* the entry of the ERISA

judgment against Tru-Tech. The district court found that from the time of judgment in November, 1988, until the dissolution of Tru-Tech in May, 1990, Peacock, as the sole director of Tru-Tech, "directed the management of Tru-Tech's affairs to defeat the collection of the judgment by siphoning off the assets of the corporation to certain favored creditors owned or controlled by Peacock." Pet. App. 41a. The district court further found that "it was the specific intent of Peacock to defraud the former employees of Tru-Tech who were beneficiaries of the Pension Plan and to defeat their legitimate attempt to collect a lawful judgment." *Id.* 42a. Based on these and other findings, the district court ruled that the judgment could be enforced against Peacock. *Id.*

The questions posed here therefore concern the scope of a federal court's authority to enforce its judgments against persons not named in the judgment but who are closely connected to the judgment debtor. Specifically, the questions posed are (i) whether the district court had jurisdiction to determine whether its judgment in the original litigation was enforceable against Peacock; and (ii) if so, whether that court correctly decided that the judgment was so enforceable. It is to those questions that we now turn.

B. In answering the threshold jurisdictional question, it aids analysis, we believe, to consider three generic situations in which a federal court in enforcing its judgment may be called on to exercise jurisdiction over claims regarding persons who were not named in that judgment but who nonetheless are linked to the judgment debtor.

The first class of cases is the one in which a judgment debtor is alleged to have secreted the debtor's assets by transferring possession, but not ownership, of these assets to a spouse, a child or a business entity controlled by the judgment debtor or his family. In these cases, the federal court may be called upon to bring the spouse, child, or controlled business entity before it in order

to adjudicate whether the third party is in possession of the debtor's assets, and, if so, to compel the third party to transfer the debtor's assets to the judgment creditor in order to satisfy the court's judgment.

Second, there are cases in which a judgment debtor is alleged not merely to have transferred possession of assets of the debtor but to have fraudulently conveyed ownership to a related third party (again, such as a family member or a commonly controlled corporation) in order to defeat the judgment of a federal court. In these cases, the federal court may be called upon to bring the third party before it in order to adjudicate the lawfulness of the conveyance and, if fraudulent, to compel the third party to transfer the assets to the judgment creditor to satisfy the court's judgment.

Third, and finally, are cases like the instant one in which subsequent to the entry of a federal court judgment, the controlling owner or officer of a corporate judgment debtor is alleged to have disregarded the debtor's corporate form and to have depleted the debtor's assets to frustrate the execution of the court's judgment. In these cases, the federal court may be called upon to bring the third party before it to determine whether the third party has become the alter ego of the judgment debtor such that the court's judgment can be enforced against the third party (and all of that party's assets, whether or not previously owned by the judgment debtor).[1]

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[1] It is hornbook law that "when the corporation is the mere alter ego, or business conduit of a person, it may be disregarded. . . . . The rationale behind the alter ego theory is that if the shareholders themselves, or the corporations themselves, disregard the legal separation, distinct properties, or proper formalities of the different corporate enterprises, then the law will likewise disregard them so far as is necessary to protect individual and corporate creditors". 1 W.M. Fletcher, *Fletcher Cyclopedia of the Law of Private Corporations*, § 41 (1990). *See also First National City Bank v. Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611, 629 (1983) ("where a corporate entity is so extensively controlled by its owner that a relationship of principal and

In each of these situations, the federal court must, of course, first acquire jurisdiction over the person before the third party can be brought before the court.[2] But where that is accomplished through proper service of process, the question then arises as to whether the federal court has subject matter jurisdiction over the proceeding so as to enable the court to adjudicate the secretion, fraudulent conveyance, or alter ego issues.

C. The principles that govern the answer to that question were stated by Chief Justice Marshall 170 years ago in *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 23 (1825):

> The jurisdiction of a court is not exhausted by the rendition of its judgment but continues until that judgment shall be satisfied. Many questions arise on the process subsequent to the judgment in which jurisdiction is to be exercised. . . . Were it even true that jurisdiction could technically be said to terminate with the judgment, an execution would be a writ necessary for the perfection of that which was previously done, and would, consequently, be necessary to the beneficial exercise of jurisdiction.

The Court reaffirmed the teaching of *Wayman* in *Riggs v. Johnson County*, 73 U.S. (6 Wall.) 166, 187 (1867)—on which the court below principally relied—adding that:

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agent is created, . . . one may be held liable for the actions of the other") (citing *NLRB v. Deena Artware, Inc.*, 361 U.S. 398, 402-04 (1960)). *Accord G.M. Leasing Corp. v. United States*, 429 U.S. 338, 345 (1977); *Southport Petroleum Co. v. NLRB*, 315 U.S. 100 (1942).

[2] Grant Peacock denies that the federal district court in South Carolina properly acquired jurisdiction over him. But that issue was not addressed by the court of appeals and is not fairly encompassed in the questions presented by Peacock's petition for certiorari. In any event, it is well established that a court with personal jurisdiction over a corporation may also exert personal jurisdiction over its alter egos when the latter seek to avoid a federal judgment and to benefit themselves. *See* 4 Wright, Miller & Kane, *Federal Practice and Procedure* § 1069 (Supp. 1984).

> [T]he rule is universal, that if the power is conferred to render the judgment or enter the decree, it also includes the power to issue proper process to enforce such judgment or decree. . . . Process subsequent to judgment is as essential to jurisdiction as process antecedent to judgment, else the judicial power would be incomplete and entirely inadequate to the purpose for which it was conferred by the Constitution.[3]

These principles have given rise to what we now refer to as the federal courts' "ancillary jurisdiction." Under this rubric, as this Court stated just last Term, the Court has "recognize[d] federal courts' jurisdiction over some matters (otherwise beyond their competence) that are incidental to other matters properly before them." *Kokkonen v. Guardian Life Ins. Co. of America*, —— U.S. ——, 114 S. Ct. 1673, 1676 (1994).[4] And, one of the primary offices of ancillary jurisdiction, as *Kokkonen* states, is "to enable a court to function successfully, that is, to manage its proceedings, *vindicate its authority, and effectuate its decrees.*" *Id.* at 1676 (emphasis added).[5]

A federal court's ancillary jurisdiction to effectuate its decrees extends not only to claims against parties to the

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[3] *See also, e.g., Bank of the United States v. Halstead*, 23 U.S. (10 Wheat.) 51, 53 (1825) ("The authority to carry into complete effect the judgments of the Court, necessarily results, by implication, from the power to ordain and establish such Courts. The suit does not terminate with the judgment, and all proceedings on the execution are proceedings in the suit").

[4] *See also* 6 Wright, Miller & Cooper, *Federal Practice and Procedure* § 1444 (2d ed. 1990) ("Ancillary jurisdiction is "based on the premise that a district court acquires jurisdiction over a case or controversy in its entirety and, as incident to the disposition of a dispute that is properly before it, may exercise jurisdiction to decide other matters raised by the case over which it would not have jurisdiction were they independently presented").

[5] In *Kokkonen*, the prior proceeding had been settled and as a result of the settlement the district court had entered a judgment of dismissal. This Court observed that:

> [I]f the parties' obligation to comply with the terms of the settlement agreement had been made part of the order of

judgment but to third parties as well. That is the clear teaching of *Labette County Commissioners v. United States ex rel. Moulton*, 112 U.S. 217 (1884).

In *Labette County*, a plaintiff who had obtained a federal court judgment against a Kansas township sought to invoke the court's ancillary jurisdiction to obtain a writ of mandamus requiring the county in which the township was located to levy taxes to satisfy the judgment, as required by Kansas law. The County Commissioners sought to avoid the enforcement of the federal judgment as against them, stating that "because they are not parties to the judgment against Oswego Township, and are not officers of or representatives of that municipal corporation, but are officers of the County of Layette, the proceeding against them is the exercise of an original jurisdiction, which does not belong to that court." 112 U.S. at 219.

This Court *rejected* that argument. The Court explained that while it "is quite true . . . that there is no original jurisdiction in the circuit courts in mandamus," it is nonetheless appropriate for the federal court to issue a writ "in aid of a jurisdiction previously acquired" and "as the only means of executing their judgments." 112 U.S. at 220. And the Court specifically ruled that even though "the jurisdiction in mandamus is ancillary," that jurisdiction can "be exercised over persons not parties to the judgment sought to be enforced." *Id.*[6]

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dismissal—either by separate provisions (such as a provision "retaining jurisdiction" over the settlement agreement) or by incorporating the terms of the settlement agreement in the order, ... a breach of the agreement would be a violation of the order, and ancillary jurisdiction to enforce the agreement would therefore exist. [*Kokkonen*, 114 S. Ct. at 1677.]

[6] *Cf. Root v. Woolworth*, 150 U.S. 401, 411 (1893) (a federal court has ancillary jurisdiction to enforce a judgment on behalf of a party in privity with a party to the judgment); *Dugas v. American Surety*, 300 U.S. 414, 428 (1937) (same).

Indeed, the rule could hardly be otherwise. A judgment issued by a federal court is not idle words on a piece of paper, but rather the manifestation of an official governmental act intended to have the force and effect of law. A judgment would be far less than that if the federal courts lack the authority to address and resolve issues that arise when the party in whose favor the judgment runs is unable to obtain the benefits of the judgment and claims that the party against whom the judgment runs has conspired with third parties to engage in conduct designed to evade the operation of the judgment. "If a party can make himself a judge of the validity of orders which have been issued, and by his own act of disobedience set them aside, then are the courts impotent, and what the Constitution fittingly calls 'the judicial power of the United States' would be a mere mockery." *Gompers v. Bucks Stove & Range Co.*, 221 U.S. 418, 450 (1911).

The instant case thus involves nothing more than a run-of-the-mine application of a federal court's ancillary jurisdiction to "effectuate its decrees." Indeed, the instant case follows *a fortiori* from *Labette County*. There, ancillary jurisdiction was exercised over a claim against third parties—the county commissioners—even though no suggestion was made that the commissioners had done anything to frustrate the effectuation of the federal court's judgment. Here, in contrast, that is precisely what occurred. As noted above, respondents here alleged—and the district court found—that Grant Peacock, as Tru-Tech's sole director, acted to defeat the district court's judgment by "siphoning off the assets of the corporation" and transferring those assets to a corporation wholly-owned by Peacock and to a trust Peacock established for his wife.

Thus, ancillary jurisdiction is appropriate here not merely "in aid of a jurisdiction previously acquired," *Labette County*, *supra*, but, moreover, to "vindicate [the federal court's] authority and effectuate its decrees," *Kokkonen*, *supra*. If the power to "vindicate its author-

ity" is to mean anything, it must encompass cases such as this.

Labette County also disposes of Peacock's contention that due process concerns are implicated when a federal court extends its ancillary enforcement jurisdiction to a third party not named in the judgment. The county commissioners in *Labette County* were strangers to the judgment there, yet this Court had no difficulty in holding the claim against the commissioners to be within the federal court's ancillary jurisdiction. In *Labette County* it was enough for the Court that the county commissioners were "the parties on whom the law has cast the duty of providing for [the judgment's] satisfaction." 112 U.S. at 220.

Here, the claim is that Peacock has such a legal duty because he acted in such a way as to make himself the alter ego of—and thus, legally inseparable from—the party already before the court. If the exercise of ancillary jurisdiction in *Labette County* is consistent with due process, it again follows *a fortiori* that the exercise of such jurisdiction is proper here.

D. Grant Peacock's case thus reduces to the claim that the decision below is contrary to *H.C. Cook Co. v. Beecher*, 217 U.S. 497 (1910), the precedent the court below went to great pains to distinguish. Petitioner grossly overreads *Beecher*.

1. In *Beecher*, a Connecticut corporation brought a patent infringement suit in federal court against a second Connecticut corporation, alleging that the defendant was selling a product which infringed plaintiff's patent. The plaintiff corporation, after prevailing, sought to collect its judgment and found that the judgment exceeded the assets of the defendant corporation. The plaintiff corporation then filed a second suit in federal court against the *directors* of the defendant corporation, alleging that the directors voted to continue sales during the first lawsuit, and voted to expend funds to defend the lawsuit, knowing

that insolvency "would be the result of a judgment against [their corporaion in the first suit], . . . for the purpose of increasing the value of their stock in the company, and of receiving the profits and dividends that might be received from the sale." 217 U.S. at 498.

In an opinion whose analysis is contained in just one paragraph, this Court construed the suit against the directors as "an attempt to make the[m] answerable for the judgment already obtained." 217 U.S. at 498. The Court then stated without further explication that the case did not fall within the federal court's ancillary jurisdiction, concluding: "If the directors are under obligations by Connecticut to pay a judgment against their corporation, that is not a matter than can be litigated between citizens of the same State in the Circuit Court of the United States." *Id.*

Whatever the reasoning underlying the Court's conclusion in *Beecher*—and the Court's opinion provides no further insight into that reasoning—at least this much is clear: *Beecher* did not involve, and cannot be stretched to govern, the federal court's ancillary jurisdiction to "effectuate its decrees." *Kokkonen*, 114 S.Ct. at 1676.

There was no claim in *Beecher* that the directors had done anything *subsequent* to the entry of judgment to frustrate the enforcement of that judgment. Rather, the sole claim in *Beecher* was that because the directors of the corporation, *prior to the entry of judgment*, had managed the corporation in a way that did not take into account the pendency of the lawsuit (but that was not otherwise fraudulent or unlawful) the directors had opened themselves up to personal liability.

The question of whether there is federal court ancillary jurisdiction over such pre-judgment conduct is a question of substance. But it is not a question going to the existence of ancillary jurisdiction to effectuate decrees. That head of jurisdiction is concerned with conduct that takes place *after* a federal judgment is entered and that amounts to an effort to avoid that judgment.

Beecher's ruling that the claim against pre-judgment conduct there was not cognizable in federal court thus has nothing to say about the exercise of ancillary jurisdiction in cases like the instant one, where post-judgment conduct undermines the federal court's authority and its judgment.

2. In drawing the distinction just noted, we do not mean to suggest that there is no federal court ancillary jurisdiction to adjudicate claims that, by virtue of pre-judgment conduct, a third party should be held liable for the acts of a defendant wrongdoer. Indeed, this Court upheld the exercise of ancillary jurisdiction in just such a situation in *Dewey v. West Fairmont Gas Coal Co.*, 123 U.S. 329 (1887). *Dewey* was a diversity case in which the counterclaim plaintiff was permitted to implead a third party—with respect to whom there was no diversity of citizenship—where the counterclaim defendant was alleged to have become insolvent by fraudulently conveying assets to the third party. And, *Dewey*'s exercise of ancillary jurisdiction was cited with approval in *Finley v. United States*, 490 U.S. 545, 551-52 n.4 (1989).

It is not at all clear whether, and if so how, *Dewey* and *Beecher* can be harmonized so as to provide a coherent basis for defining the scope of ancillary jurisdiction to adjudicate claims that a third party's *pre-judgment* conduct makes that party liable for the defendant's wrongs. It may well be that *Beecher* reaches the right result but not on jurisdictional grounds.[7] The claims against the directors in *Beecher* rested on the extraordinary theory that during a lawsuit against a corporation the directors must act as trustees for the plaintiff or open themselves up to personal liability. We know of no legal support for that substantive theory and no basis why the claim should not have been dismissed on the merits.

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[7] *Cf. Argento v. Village of Melrose Park*, 838 F.2d 1483, 1488 (7th Cir. 1988) (questioning continuing vitality of *Beecher*); *Skevofilax v. Quigley*, 810 F.2d 378, 385 n.5 (3rd Cir. 1987) (en banc), *cert. denied*, 481 U.S. 1029 (reinterpreting *Beecher* as a statutory, rather than a jurisdictional, decision).

It is not necessary to decide that question here, however, because, as just explained—and as the court of appeals concluded, *see* Pet. App. 15a—the conflict between *Beecher* and *Dewey* and the question raised by those cases simply is not implicated here. For present purposes, it is enough to conclude that whatever the rule in the *Beecher* context, the federal courts ancillary jurisdiction plainly extends to claims that, subsequent to the entry of a judgment, the judgment debtor and a closely-related third party have colluded to frustrate the effectuation of that judgment.

E. The only remaining question is whether, on the merits, the courts below properly held that the judgment against Tru-Tech could be enforced against Grant Peacock. That question turns on the application of hornbook veil piercing principles to the facts of this case. As such, the question ordinarily would not merit the attention of this Court. Peacock therefore seeks to engage the Court's attention by focusing on a choice of law question addressed below.

The court of appeals did reason that because ERISA governs the determination of "*who* is liable for breaches of ERISA fiduciary duties, we believe that ERISA preempts any state law of veil piercing" and states the rule for determining when to pierce the corporate veil to enforce an ERISA judgment against officers or directors based upon their conduct subsequent to the entry of the judgment. Pet. App. 20a-21a (emphasis in original).

But immediately after deciding to apply a "federal common law veil-piercing rule," Pet. App. 21a—rather than to incorporate a state law rule into federal law, *see United States v. Kimball Foods, Inc.*, 440 U.S. 715, 726 (1979)—the court of appeals went on to conclude that the "federal common law veil-piercing rule accords with our understanding of the South Carolina rule," Pet. App. 22a, n.16, *viz.* with the state-law rule that would be incorporated into federal law if the federal common law derived from ERISA were not controlling.

Since, under the decision below, the choice between federal law and state law is *immaterial* to the outcome here, this case provides a particularly *inappropriate* vehicle for the Court to resolve the choice of law question Peacock raises.[8]

That being so, we respectfully submit that the Court either should dismiss the writ of certiorari with respect to the second question raised here or, alternatively, should uphold the determination below on the ground that regardless of whether federal common law or state law incorporated into federal law applies, it is proper to enforce the judgment against Peacock.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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[8] The Court also need not decide whether, as the court below assumed, the veil-piercing rule used to determine when a judgment may be enforced against a corporate owner is necessarily the same as the rule for determining when the owner can be held liable for the corporation's wrong in the first instance since the only issue raised here concerns veil-piercing to enforce a judgment. *See* pp. 3-4, *supra*.